

JUN 19 1972

In the  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1972

No. \_\_\_\_\_

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

*Appellants,*

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and its Members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and its Members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA.

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**JURISDICTIONAL STATEMENT**

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June, 1972:

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*Appellants,*

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and NATHAN A. SAMS, Chairman, A. E. PLUME, Vice-Chairman, TOM R. MOORE, Member, RAYMOND H. FIELDS, Member, E. W. HARPER, Member, JOSEPH TURNER, Member, and MRS. JOHN D. (HELEN) COLE, Member, in their individual capacities and as members of the defendant Oklahoma State Personnel Board; and KEITH B. FROSCO, Director of the Oklahoma State Personnel Board; and the CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, Chairman, RAY C. JONES, Vice-Chairman, and WILBURN CARTWRIGHT, Member, in their individual capacities and as members of the defendant Corporation Commission; and LARRY DERRY-BERRY, Attorney General of Oklahoma,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA.

---

**JURISDICTIONAL STATEMENT**

---

**THE OPINION BELOW**

The Three-Judge Court convened to hear and decide this cause in the United States District Court for the Western District of Oklahoma and delivered its written Memo-

randum Opinion on February 14, 1972. The opinion is officially reported as *William M. Broadrick, et al. v. The State of Oklahoma, ex rel. the Oklahoma State Personnel Board, et al.*, 338 F.Supp. 711 (1972). The opinion is reproduced in the Appendix to this Jurisdictional Statement, beginning on page i.

**STATEMENT OF THE GROUNDS ON WHICH  
THE JURISDICTION OF THIS COURT  
IS INVOKED**

1. This is a civil class action for declaratory and injunctive relief to enjoin the deprivation of the civil rights of Appellants and all classified employees of the State of Oklahoma, and is authorized by 42 U.S.C. §1983. The Appellee, Oklahoma State Personnel Board, initiated proceedings against each Appellant under color of 74 O.S. 1971 §818 to dismiss each Appellant from his employment with the Corporation Commission of the State of Oklahoma for alleged political activities. Appellants are accused variously of soliciting campaign contributions, seeking out others to engage in political activities and transporting campaign posters. Appellants contend that the blanket prohibitions against political activities in the statute unjustifiably encroach upon the Appellants' First Amendment rights of free speech, assembly and press, and denies equal protection of the laws in that it denies that group of citizens the rights granted to all other State employees and all other citizens, and there is no justification for the distinction. Appellants also contend that the statute divests those classified employees of the Fifth and Fourteenth Amendment guarantees of due process of law in that Appellants are denied political liberty without justification. The decision

of the Three-Judge Court of the United States District Court for the Western District of Oklahoma sustained the validity of 74 O.S. 1971 §818.

2. The judgment or decree sought to be reviewed is the ruling of the Three-Judge Court denying Appellants' application for declaratory and injunctive relief and dismissing Appellants' cause of action. The Motion for New Trial was filed on March 9, 1972, and was overruled on March 31, 1972. The Appellants' Notice of Appeal was filed in the United States District Court for the Western District of Oklahoma on April 21, 1972.

3. Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 inasmuch as this proceeding challenges the constitutionality of a State statute, and 28 U.S.C. §2281 requires a District Court of three judges to determine the issue.

4. Cases sustaining the jurisdiction of this Court are:

*—Dombrowski v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116;

*King v. Smith*, 392 U.S. 309, 20 L.Ed.2d 1118, 88 S.Ct. 2128;

*Damico v. California*, 389 U.S. 416, 19 L.Ed.2d 647, 88 S.Ct. 526 (1967).

*Keyishan v. Board of Regents of New York*, 87 S.Ct. 675 (1967);

*Kinnear v. City and County of San Francisco*, 38 Cal.Rptr. 631, 392 P.2d 391;

*Pickering v. Board of Education*, 88 S.Ct. 1731;

*United Public Workers of America v. Mitchell*, 67 S.Ct. 556 (1947);

5. The constitutional validity of the 6th and 7th unnumbered paragraphs of 74 O.S. 1971 §818 (Oklahoma Statutes) is here involved. The challenged paragraphs provide:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

The entire statute is lengthy and is set out verbatim in the Appendix. The Oklahoma State Personnel Board is proceeding according to the 8th unnumbered paragraph of the statute which provides as follows:

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Di-

rector to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

74 O.S. 1971 §819 declares violations to be a misdemeanor. However, criminal prosecutions are not pending nor contemplated at this time.

### **QUESTIONS PRESENTED BY THE APPEAL**

I. May a State constitutionally broadly prohibit State employees from:

- (1) Freely and publicly expressing opinions regarding any political party or any political campaign?
- (2) Taking part in any political campaign?
- (3) Taking part in the management or affairs of any political party?
- (4) Being a candidate for nomination or election to any paid political office?
- (5) Being an officer or member of a committee of a partisan political club?
- (6) Being a member of any national, state or local committee of a political party?
- (7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contri-

bution for any political organization, candidacy or other political purpose?

II. May a State constitutionally classify the employees of some, but not all, of its State agencies and broadly prohibit the employees of those agencies from engaging in the activities described above while permitting the unclassified employees of the State, all other public employees and the citizenry at large to freely engage in those activities?

#### **STATEMENT OF THE FACTS OF THE CASE**

Appellants, William M. Broadrick, Jimmy R. Ury and Clive R. Rigsby, are employees of the Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State. They are residents of the State of Oklahoma and of the United States.

The 1959 Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration Act, 74 O.S.A. §§801 *et seq.*, which placed the employees of certain named State agencies within the classified service for the stated purpose of rendering their employment subject to merit rather than political allegiance. The Act prohibits the designated agencies from dismissing or suspending classified employees for political reasons, but it authorizes the State Personnel Board to effect dismissal or suspension of a classified employee who is politically active, and even prohibits the expression of political sentiments other than private expressions.

On October 18, 1971, the Personnel Board formally accused each Appellant of prohibited political conduct dur-

ing the 1970 re-election campaign of Corporation Commissioner Ray C. Jones. The Appellants then sought injunctive and declaratory relief in the United States District Court for the Western District of Oklahoma challenging the constitutional validity of that part of the Oklahoma Merit Act which prohibits political expressions and activities on the part of classified employees as violating their First Amendment rights of free speech, assembly and press; and their Fifth and Fourteenth Amendment rights to equal protection and due process of law.

A Three-Judge Court was convened to hear and determine the case. The Court dismissed the cause of action. In so doing, the Court narrowly construed the Act to prohibit only partisan *party* political activities and found that the statute does not restrict public expressions on public affairs and personalities so long as the employee does not channel his activity towards party success.

### **THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL**

The many cases cited by the parties to support their respective arguments demonstrate that numerous legislative bodies throughout the United States have enacted State statutes, county, city, district and local ordinances proscribing the political liberties of public employees.

The statutes and ordinances encroach in varying degrees upon the First Amendment rights of free speech, assembly and press of those public employees and effectively inhibit the political liberties of the families of those public employees. If a public employee may not operate a

vehicle displaying a sentiment with political overtones or display a political sentiment in his front yard, the family car and the family home, and thus the entire family, are affected.

In *Dombroski v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, this Court pointed out that:

"The chilling effect upon exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure . . . .

"So long as the statute remains available to the state, the threat of prosecution of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect upon protected expression."

Although the highest courts of some states have had the opportunity to strike down the portions of those enactments which encroach too far upon the Federally-protected right of free speech, the paralyzing chill of similar enactments in other jurisdictions will continue until some hardy soul in each of those jurisdictions is willing to risk his fortunes and livelihood to vindicate those Federally-protected rights.

On February 10, 1947, this Court decided *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), sustaining the validity of the Federal Hatch Act, 5 U.S.C. §7321 *et seq.*, against contentions that the Act unconstitutionally divested Federal employees of their Federally-protected constitutional rights of free speech, equal protection and due process.

The Hatch Act generally prohibits Federal employees from engaging in certain political activities which the Congress deemed contrary to the public interest. The Act applies equally to all Federal employees except those in high-level administrative positions, policy-making positions and other reasonably excepted positions. The Act expressly permits Federal employees to freely and publicly express their opinions about political candidates and issues. The Act defines the political campaigns in which a Federal employee may and may not participate, and the classification relates reasonably to the extent to which participation in such campaigns may affect the integrity of the service.

Since *Mitchell*, numerous state and local legislative bodies have enacted civil service type statutes and ordinances which go far beyond the Hatch Act in restricting the political liberties, freedom of speech, freedom of press, freedom of assembly, equal protection and due process rights of public employees guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The proliferation of those enactments is exemplified by the multitude of litigated cases in the State and Federal Courts. The results in those cases have not been uniform, and invariably turn on questions of Federal constitutionality in the State as well as the Federal forums. In general, the Courts wrestle with the ultimate question: Whether a compelling state or local interest justifies the obvious deprivation of Federally-protected First, Fifth and Fourteenth Amendment rights of those affected by the enactments? The Oklahoma Merit System of Personnel Administration Act, 74 O.S. 1971, §801 *et seq.*, stifles and circumscribes those rights to a far greater extent than the

Hatch Act, and the Oklahoma Act is not unique. The various State and local counterparts throughout the nation affect millions of American citizens and paralyze the exercise of fundamental freedoms to a far greater extent than is necessary to accomplish the legitimate purposes of those enactments. This result is universally accomplished by framing those enactments in terms broad enough and vague enough, unlike the Hatch Act, to assure that the public employees covered by those enactments exhibit no political coloration of any kind, character or degree.

The Oklahoma Act prohibits classified employees from taking part in the management or affairs of any political campaign; it does not exempt initiative and referendum campaigns as does the Hatch Act; it permits only private expressions of political opinions; and it broadly prohibits a classified employee from becoming a candidate for nomination or election to any paid public office.

It is not reasonable to decree that the public or semi-public expression of a typist employed by the Oklahoma Corporation Commission regarding her opinion about a presidential candidate, or school board candidate, mayor candidate, sheriff or candidate to the State Legislature, conceivably destroys the integrity of the State Government. This purported threat to a compelling State interest is rendered less defensible by the simultaneous decree that a typist performing essentially the same functions in the office of the Secretary of State may freely engage in political activities without restriction. The employees of one arbitrarily selected State agency are subject to the Merit Act, and the employees of the other arbitrarily excluded

agency are not subject to the Act; 74 O.S. 1971, §§803, 803.1, 803.2 and 803.3, beginning on page xii of the Appendix.

It is argued that *Mitchell* legitimizes these disenfranchisements of a large and ever-growing segment of the national community despite the relatively innocuous proscriptions of the Hatch Act. This illusion cries out to be dispelled by this Court. The illusion persists despite explicit expressions from this Court. In *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, a School Board fired a teacher for publicizing his opinions concerning the School Board and the operations of the school, and this Court pointed out that:

“\* \* \* Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”

Public employees, as a class, are the members of the community most apt to be informed regarding the efficiency, integrity and other qualities of those who administer the public agency employing them. The electorate could and should have the benefit of those opinions. The free availability of informed opinions serves the public interest, and the suppression of informed opinions serves only villainy. The credibility of those opinions is subject to the same evaluating criteria as are applied to all opinions. They should not be stifled.

In *Keyishan v. Board of Regents of New York*, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675, this Court determined that the State of New York could not in vague and broad terms

prohibit faculty members of the State University from uttering sedition or distributing material advocating the forceful overthrow of government or making Communist Party membership *prima facie* evidence of disqualification; and in *Dombrowski v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, determined that the Louisiana Subversive Activities and Communist Control Law was unconstitutionally vague and overbroad, stating that an overly broad statute created a "danger zone" within which protected expression may be inhibited.

Some State and Federal Courts have applied the foregoing cases and have struck down vague and overbroad political activities restrictions in civil service-type enactments. Others have not. The court below in this cause did not.

In *Fort v. Civil Service Commission, County of Alameda*, 38 Cal.Rptr. 625, 392 P.2d 385, the California Supreme Court struck down Section 41 of the Charter of Alameda County as unconstitutional under the First Amendment of the Federal Constitution in a proceeding wherein a civil servant of the County became Chairman of a Speakers Bureau for a Committee to re-elect Governor Brown. The language of that Section is almost identical to the political activities prohibitions challenged in this proceeding. In *William J. Kinnear v. City and County of San Francisco*, 38 Cal.Rptr. 631, 392 P.2d 391, the California Supreme Court reinstated a deputy sheriff who had been dismissed for filing for election to a public office. Section 5 of the San Francisco Charter provided that the civil service position was automatically forfeited under the circumstances. Overbreadth was the defect of that ordinance. It

forfeited the position of any city officer or employee who became a candidate for election to any public office. In that connection, the Oklahoma Act prohibits a classified employee from becoming a candidate to any paid political office.

The Oregon Supreme Court struck down a similar Oregon statute in *Minnelly v. State*, 411 P.2d 69, again, principally on the basis of the First Amendment to the Federal Constitution.

The United States Fifth Circuit Court of Appeals struck down a city ordinance of the City of Macon, Georgia, in *Hobbs v. Thompson*, 448 F.2d 456. The ordinance prohibited the employees of the City's Fire Department from taking an active part in any primary or election and prohibited them from contributing money to any candidate, soliciting votes or prominently identifying themselves in a political race with or against any political candidate for office. The opinion is a scholarly analysis of the leading decisions relating to political activities restrictions as opposed to federally-protected First, Fifth and Fourteenth Amendment rights. The opinion does not undertake to distinguish the Hatch Act or *Mitchell*, but concludes that *Mitchell* does not square with later civil rights decisions by this Court.

### ABUSE OF DISCRETION BY THE COURT BELOW

Appellants respectfully represent and show that they prepared and filed three separate briefs with the court below and thereafter presented oral argument to the Court supporting their position. Many cases were cited in the briefs and argument including *Keyishan*, *Dombrowski* and *Pickering*, all *supra*, from this Court, and *Fort*, *Kinnear* and *Minnelly*, all *supra*, from the Supreme Courts of California and Oregon. The recent *Hobbs* decision, *supra*, from the United States Fifth Circuit Court of Appeals was emphasized in the briefs and argument. Those cases are addressed to the precise issues in this action and are, in our judgment, dispositive.

The Memorandum Decision of the Three-Judge Court neither distinguishes those cases from this case nor rebuts the principles of law expressed in those cases, but wholly ignores those cases. None of those cases are mentioned in the Memorandum Decision.

The decision is based principally on *Mitchell* (1947), *supra*, and *Gray v. City of Toledo*, D.C., 323 F.Supp. 1281.

In *Mitchell*, this Court considered the Hatch Act and observed, 330 U.S. at 99-100, 67 S.Ct. 556:

“It \* \* \* forbids only the *partisan* activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests \* \* \*

“\* \* \* It is only *partisan* political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public

*or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.*" (Emphasis supplied.)

*Mitchell* simply does not redeem the Oklahoma statute which broadly prohibits a classified employee from taking part in the management or affairs of *any* political campaign "except to exercise his right as a citizen *privately* to express his opinion and to cast his vote." (Emphasis supplied.)

The *Gray* decision, *supra*, cited by the Three-Judge Court, wholly supports Appellants' cause of action. That Court expressly held that a Toledo City Charter and Rule provision which prohibited specified employees from soliciting or receiving contributions for any "political purpose" was ambiguous, overreaching and unconstitutional.

The Oklahoma statute provides:

"No employee in the classified service \* \* \* shall, directly or indirectly, solicit or receive, or in any manner be concerned in soliciting or receiving any \* \* \* contribution for any political organization, candidacy or other political purpose \* \* \*."

The *Gray* decision further held that the phrases, "candidate for public office," "political movements," "political campaigns," "organization" and "political club" are imprecise and overreaching. The Oklahoma statute is replete with identical and similar phrases.

The *Gray* decision also considered Section 143.41 of the Ohio Revised Code and pointed out that the statute by

itself left the impression that the statute was overreaching and encompassed protected political activities, but acquiesced in the Ohio Supreme Court's narrow construction of the statute stating:

"In declaring a litigant's rights under a state statute this Court must read the statute in light of the interpretation given it by the state courts."

The Three-Judge Court in this action utilized the explanation of that narrow construction to narrowly construe the Oklahoma statute. In that connection, the Ohio statute expressly permitted the public employees of that state to "express freely" their "political opinions."

The *Gray* decision did hold that the political activities restrictions of the Toledo City Charter and Rules constituted an "unconstitutional gagging of a policeman's right to free speech and expression."

### **CONCLUSION**

There has been a proliferation of civil service type State and local enactments throughout the nation since this Court decided *Mitchell*. Those enactments are typically vague and overbroad. This Court has repeatedly stated that statutes which encroach upon the fragile First, Fifth and Fourteenth Amendment rights of a class of citizens must be narrowly drawn so as to encroach upon those rights only to the extent absolutely necessary to accomplish a legitimate State purpose, and that the purpose must be a compelling purpose. The Oklahoma Merit System of Personnel Administration Act does not meet that test.

Petitioners respectfully submit that the Federal question presented in this appeal is substantial indeed. That too many voices which should be heard are stilled and paralyzed by an array of State and local enactments ostensibly designed to free public employees from political rewards and reprisals but which, in fact, punish those employees for the exercise of their First Amendment rights of free speech, assembly and press unnecessarily and without the compelling justification required for the limitation of those rights.

The cases, both State and Federal, are in serious conflict. *Mitchell* was the last expression of this Court respecting the balance between First, Fifth and Fourteenth Amendment rights and a compelling governmental interest in preserving the integrity of its public servants. The widespread adoption of State and local civil service-type enactments has occurred since that 1946 opinion. *Hobbs* raises the serious question as to whether or not *Mitchell* now squares with intervening civil rights expressions from this Court. Appellants respectfully urge this Court to review the decision of the Three-Judge Court appealed from herein.

Respectfully submitted,

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*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

The Honorable Larry Derryberry,  
State Attorney General,  
State Capitol Building  
Oklahoma City, Oklahoma 73105

Keith B. Frosco, Director  
State Personnel Board  
407 Sequoyah Memorial Building  
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel  
and

Harvey Cody, Conservation Attorney  
Oklahoma Corporation Commission  
Jim Thorpe Building  
Oklahoma City, Oklahoma 73105

all parties required to be served, by mailing such true and correct copies, postage prepaid, this \_\_\_\_\_ day of June, 1972.

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**TERRY SHIPLEY**

## APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Stamped]  
FILED

Feb 14 1972

REX B. HAWKS  
Clerk, U. S. District Court  
By (illegible)  
Deputy

WILLIAM M. BROADRICK, JIMMY )  
R. URY, and CLIVE R. RIGSBY, for )  
themselves and for the Class, "Classi- )  
fied Employees within the Classified )  
Service of the State of Oklahoma" )  
)  
)  
Plaintiffs )

vs.

) CIVIL NO. 71-696

)  
THE STATE OF OKLAHOMA, ex rel., )  
THE OKLAHOMA STATE PERSON- )  
NEL BOARD, and NATHAN A. SAMS, )  
Chairman, A. E. PLUME, Vice-Chair- )  
man, TOM R. MOORE, RAYMOND H. )  
FIELDS, E. W. HARPER, JOSEPH )  
TURNER, and MRS. JOHN D. (HEL- )  
EN) COLE, Members, in their indi- )  
vidual capacities and as members of the )  
defendant, OKLAHOMA STATE PER- )  
SONNEL BOARD; and KEITH B. )  
FROSCO, Director of the Oklahoma )  
State Personnel Board; and the COR- )  
PORATION COMMISSION OF THE )  
STATE OF OKLAHOMA, CHARLES )  
NESBITT, Chairman, RAY C. JONES, )  
Vice-Chairman, and WILBURN CART- )  
WRIGHT, Member, in their individual )

**[APPENDIX]**

capacities and as members of the defendant Corporation Commission; and )  
LARRY DERRYBERRY, ATTORNEY )  
GENERAL )  
Defendants )

---

Terry Shipley, Noble, Oklahoma, and John C. Buckingham, Oklahoma City, Oklahoma, for Plaintiffs

Jack Swidensky and Harvey Cody, General Counsel and Conservation Atty. respectively for Defendant, Corporation Commission and Commissioners; Honorable Larry Derryberry, Attorney General of the State of Oklahoma, Mike D. Martin, Paul C. Duncan, Jr., and Odie A. Nance, Assistants to the Attorney General, for Defendants State of Oklahoma, ex rel., The Oklahoma State Personnel Board, Members and Director thereof; and Defendant Larry Derryberry, Attorney General

---

William J. Holloway, Jr., United States Circuit Judge  
Fred Daugherty, United States District Judge  
Luther B. Eubanks, United States District Judge

---

**MEMORANDUM OPINION**

**EUBANKS, United States District Judge**

**BACKGROUND AND OUTLINE OF THE ISSUES**

This is a declaratory class action brought by three employees of the Oklahoma Corporation Commission seeking an Order of this Court declaring a portion of the Oklahoma Merit System of Personnel Administration Act to be unconstitutional. Jurisdiction is conceded under 42 U.S.C. § 1983 and a three-judge court was convened to hear the matter pursuant to 28 U.S.C. §2281 et seq.

The issues as framed at the pretrial conference are:

Plaintiffs contend that the defendants, and each of them, under color of 74 O.S., Section 818, in pertinent part as follows:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States. In more particularity, plaintiffs contend:

1. That the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press;
2. That the above quoted paragraphs of Section 818 are extremely broad in that they abridge plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

[APPENDIX]

3. That the above quoted paragraphs of Section 818 are unconstitutionally vague, and reasonable men often differ as to their interpretation and may only guess at what activities fall within the broad prohibition in the Statute;
4. That the above quoted paragraphs of Section 818 deny the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.
5. That the above quoted paragraphs of Section 818 divest the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;
6. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that their vested property rights are subject to divestment without just cause or due process;
7. That plaintiffs, William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, by virtue of their employment with the State of Oklahoma, have acquired valuable vested property rights. The Merit System of Personnel Administration Act of Oklahoma, *supra*, vests said plaintiffs with rights of tenure during good behavior and the Oklahoma Retirement System Act vests said plaintiffs with valuable retirement benefits upon the condition that said plaintiffs be employed in good standing upon the date of their retirement;
8. That the defendants threaten to invoke the sanctions of Section 818 against said plaintiffs for certain alleged political activities of the plaintiffs, and the defendant, Oklahoma State Personnel Board, and its members threaten to order the defendant, Corporation Commission, and its members to dismiss plaintiffs from their employment pursuant to Section 818 which requires the defendant, Corporation Commission, to comply;

9. That plaintiffs have no adequate remedy at law and the defendants will, if not enjoined by this Court, undertake to effect the dismissal of plaintiffs from their employment, all under color of Section 818.

The defendant, Corporation Commission, contends that:

1. They consider the plaintiffs good employees and have not threatened to dismiss them, or any of them, and have no intention to dismiss them unless required to do so by a lawful order of an authority authorized by law to compel said defendants to dismiss plaintiffs from their employment;

2. The defendant, Oklahoma State Personnel Board, as of the time of the filing of the answer of the above named defendants herein, had not furnished the said defendants with any details or information concerning the violations of the Merit System Act other than the copy of the original notice of the general charges made by the Board, and that said defendants were not informed as to the specific violations which the Board may expect to prove and that said defendants deny that they solicited or encouraged the plaintiffs to take part in any political activities at any time.

The State of Oklahoma, ex rel., The Oklahoma State Personnel Board contends as follows:

1. That they specifically deny that they, or any of them, under color of 74 O.S. 1961, Section 818, are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States;

2. That they specifically deny that the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press;

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3. That they specifically deny that Section 818 is overly broad in that it abridges plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;
4. That they specifically deny that Section 818 is unconstitutionally vague, and reasonable men often differ as to its interpretation and may only guess at what activities fall within the broad prohibitions in the Statute;
5. That they specifically deny that Section 818 denies the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.
6. That they specifically deny that Section 818 divests the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;
7. That they specifically deny that Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that plaintiffs' vested property rights are subject to divestment without just cause or due process;
8. That as to plaintiffs' Contention No. 7, these defendants have no knowledge as to said allegations, and therefore are unable to admit or deny same;
9. That they specifically deny that plaintiffs have no adequate remedy at law.
10. That all of the acts and actions of each of the defendants above named have been in accordance with the laws of the State of Oklahoma;
11. Said defendants specifically deny that any of the Statutes cited in plaintiffs' Complaint are unconstitutional.

Evidence was heard and arguments were presented on January 20, 1972. The Court, being fully advised, does now find and conclude:

### FINDINGS OF FACT

1. Plaintiffs are William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, citizens of the State of Oklahoma, for themselves and for the class, "Classified Employees within the Classified Service of the State of Oklahoma." Each plaintiff is, and has been at all times material, an employee of the defendant Corporation Commission of the State of Oklahoma.
2. Each plaintiff is a classified employee of the State within the purview of the Merit System of Personnel Administration Act of Oklahoma, 74 O.S. 1971, §§801, et seq., which is administered by the defendant Oklahoma State Personnel Board.
3. Defendants in the action are the State of Oklahoma, ex rel, the Oklahoma State Personnel Board, and A. E. Plume, Chairman, Raymond H. Fields, Vice-Chairman, Nathan A. Sams, Member, Tom R. Moore, Member, E. W. Harper, Member, Mrs. John D. (Helen) Cole, Member, in their individual capacities and as members of the defendant, Oklahoma State Personnel Board; Keith B. Froscio, Director of the Oklahoma State Personnel Board; Larry Derryberry, Attorney General of Oklahoma; the Corporation Commission of the State of Oklahoma, Charles Nesbitt, Chairman, Ray C. Jones, Vice-Chairman, and Wilbur Cartwright, Member, in their individual capacities and as members of the defendant Corporation Commission.
4. Pursuant to paragraphs six and seven of 74 O.S. 1971, §818 containing prohibitions against political activity on the part of certain state employees, and under authority of paragraph eight of Section 818 and 74 O.S. 1971, §805, the State Personnel Board of the State of Oklahoma on October 15, 1971, charged plaintiffs individually with violating the provisions of paragraphs six and seven of Section 818.

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5. On October 18, 1971, notices were sent by the Personnel Board to each of the plaintiffs specifying the charges made against them; after receiving a request for a hearing from plaintiffs, the Personnel Board sent amended notices to plaintiffs on November 16, 1971, reiterating the charges against them and specifying the Oklahoma Statutes under which the hearing would be conducted.

6. Pursuant to a request by plaintiffs for a more detailed description of the charges, the Personnel Board furnished specific data in the nature of a bill of particulars by separate letter to each plaintiff on December 1, 1971.

7. Upon application of plaintiffs to the Personnel Board for a stay of the hearings on the prohibited political activity charges against plaintiffs, the Personnel Board entered an order on December 16, 1971, continuing said hearings until the constitutionality of unnumbered paragraphs six and seven of Section 818 had been determined.

8. This suit filed by plaintiffs on December 16, 1971, attacks only unnumbered paragraphs six and seven of Section 818 relating to prohibited political activity on the part of certain State employees. These paragraphs go to the very heart of the Act.

9. Plaintiffs have failed to establish that reasonable men differ as to the interpretation of the provisions of paragraphs six and seven of Section 818. The same is not vague or overbroad despite minor differences in interpretation by the Attorney General.

10. Paragraphs six and seven of Section 818 are understood by reasonable men to prohibit state employees from being involved in prescribed partisan political activity.

11. Paragraphs six and seven of Section 818 are understood by reasonable men to not prohibit state employees from being involved in non-partisan political activity.

12. Plaintiffs have failed to establish that paragraphs six and seven of Section 818 have cast any chilling effect upon any state employee's First Amendment rights.

13. The issue of whether plaintiffs have or have not violated the Act is not for us to decide.

From the foregoing facts, the Court concluded:

#### CONCLUSIONS OF LAW

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fifth Amendment to the Constitution of the United States provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

3. The Fourteenth Amendment to the Constitution of the United States provides that "No state shall make or enforce any law which will . . . deny to any person within its jurisdiction the equal protection of the laws."

4. Paragraphs six and seven of Title 74 O.S. 1971, § 818, do not violate the First, Fifth or Fourteenth Amendment to the Constitution of the United States.

5. Paragraphs six and seven of Title 74 O.S. 1971, § 818, do not violate U. S. Code, Title 42, §1983.

6. We conclude that the Oklahoma Legislature has the power to regulate, within reasonable limits, the political conduct of state employees in order to promote efficiency and integrity in the public service. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Gray v. City of Toledo*, 323 F. Supp. 1281 (1971). *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970), *Wisconsin State Employees Assoc. v. Wisconsin Natural Resources Bd.*, 298 F. Supp. 339 (W.D. Wis. 1969).

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7. We conclude that the constitutional guarantees of free speech and association are not absolutes and this Court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evils of political partisanship by state employees. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), *Gray v. City of Toledo*, 323 F. Supp. 1281 (1971).

8. We find that a government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such an importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling governmental interest is sufficient to justify some encroachment upon an individual's first amendment rights. *Gray v. City of Toledo*, 323 F. Supp. 1281 (1971). *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 835 S.Ct. 889, 9 L.Ed. 2d 929 (1963). *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963).

9. We find that the provisions of unnumbered paragraphs six and seven of Title 74 O.S. 1971, §818, prohibiting political activity by state employees, are directly related to the State's goal of prohibiting partisan political activity. Said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten efficiency and integrity and does not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success. These prohibitions do not unduly infringe upon protected rights under the First Amendment to the United States Constitution. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

10. Plaintiffs claim that they have vested property rights by virtue of their employment with the State of

Oklahoma, tenure through the Merit System of Personnel Administration of Oklahoma and retirement benefits through the Oklahoma Retirement Systems Act. This may be true but by "due process" those rights might be extinguished if violations of the Act are established. The private interests of plaintiffs in their employment are not unconstitutionally affected by paragraphs six and seven of Title 74 O.S. 1971, §818. *Norman v. U. S.*, 392 F. 2d 255, 183 Ct. Cl. 41 (1968). *United Public Workers of America v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

11. The claim of plaintiffs that the holding in *Mitchell* has been eroded by the subsequent decisions cited by them is untenable. An inferior court can never "erode" a decision of the United States Supreme Court.

For the foregoing reasons the relief sought by plaintiffs is in all things denied.

Counsel for defendant State of Oklahoma, ex rel., The Oklahoma State Personnel Board will prepare appropriate order in accordance with the foregoing.

The Clerk of the Court is hereby directed to mail a copy hereof to counsel of record.

Dated this 14th day of February, 1972.

s/ William J. Holloway, Jr.

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United States Circuit Judge

s/ Fred Daugherty

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United States District Judge

s/ Luther B. Eubanks

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United States District Judge

**[APPENDIX]**

**STATE OFFICERS AND EMPLOYEES, 74 O.S. 1971**

§ 802. Placing of agencies and departments under system—Transfer of books, records, etc.—The word agency as used in this Act is defined to mean any board, commission or institution of the State Government. The Governor of the State of Oklahoma, upon determining that the merit system of personnel administration with the rules and regulations adopted thereunder should be required, is hereby empowered and authorized, at his discretion, by an Executive Order, to place any agency or department of the State Government, and the employees thereof, with exempt positions as stipulated by said order, under the merit system of personnel administration prescribed by this Act and the rules and regulations promulgated hereunder by the State Personnel Board. This Section shall not authorize by Executive Order the removal of any agency or department of State government placed under the merit system of personnel administration prescribed by this Act and the rules and regulations promulgated hereunder by the State Personnel Board.

Notwithstanding any provisions to the contrary, this Act shall not be extended to any department or agency or employee, except in the manner as provided in this Section. Pending the issuance of any such Executive Order by the Governor and pending the effective date of the system as specified in any of said orders by the Governor, the agency or departmental merit system for personnel administration heretofore established in any of the State departments shall be in full force and effect.

Any Executive Order of the Governor may provide that the agencies or departments affected thereby shall transfer to the State Personnel Board hereafter created, all books, records, registers, equipment, and other property heretofore made available for the operation of its agency or departmental merit system.

§ 803. Unclassified service.—Offices and positions in the unclassified service are in no way subject to any of the provisions of this Act or of the rules and regulations promulgated hereunder by the State Personnel Board.

The unclassified service of the State shall include the following:

- (1) persons chosen by election or appointment to fill an elective office, and their employees, except all of the employees of the Corporation Commission, who shall be under the provisions of the classified service of the State; and except the employees of the Department of Education including the Deputy State Superintendent of Public Instruction; and, provided further, that immediately upon the enactment hereof the employees of said Department of Education and said Deputy State Superintendent of Public Instruction shall become classified employees;
- (2) members of boards and commissions, and heads of departments, agencies and institutions required by law to be appointed by the Governor;
- (3) one principal assistant or deputy and one private secretary for each head of a department, agency or institution who is required by law to be appointed by the Governor;
- (4) all employees in the office of the Governor and all persons required by law to be appointed by the Governor;
- (5) judges, referees, receivers, jurors, Assistant Attorney General and notary public, as such;
- (6) officers and employees of the Oklahoma Legislature;
- (7) all officers and employees of the Oklahoma State System of Higher Education, State Board of Education, Division of Vocational Education, and all employees of all public school districts;

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- (8) patient and inmate help in the state charitable, penal, mental and correctional institutions;
- (9) persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation, or examination on behalf of the legislature or a committee thereof, or by authority of the Governor;
- (10) officers and members of the Oklahoma National Guard, as such;
- (11) persons engaged in public work for the State, but employed by contractors when the performance of such contract is authorized by the legislature or other competent authority;
- (12) election officials and employees;
- (13) temporary seasonal farm laborers, or other farm help engaged in a single phase of agricultural production or harvesting, not to exceed one hundred twenty (120) calendar days in any year;
- (14) professional trainees only during the prescribed length of their course of training or extension study;
- (15) laborers, semiskilled and skilled craftsmen temporarily engaged for purposes of building, renovation, or remodeling and paid on an hourly, or piecework basis, provided the request is made by the appointing authority and is approved by the State Personnel Board;
- (16) seasonal employees employed during the period May 1 through October 15 in any calendar year;
- (17) students who are employed on a part-time basis and who are regularly enrolled in (a) an institution of higher learning within the Oklahoma State System of Higher Education or (b) an institution of higher learning qualified to become coordinated with said State System of Higher Education.

§ 803.1. Unclassified service—Additional offices and positions.—The unclassified service of this State shall include the following offices and positions in addition to the offices and positions listed in Section 803, Title 74, Oklahoma Statutes 1961:

- (1) The Executive Secretary, State Board of Cosmetology;
- (2) The Secretary of the State Board of Registration for Professional Engineers; and
- (3) The Administrator of the Oklahoma Securities Commission.

§ 803.2. State Department of Education personnel included in unclassified service.—In addition to those offices and positions in the unclassified service of the state as now provided by law, personnel occupying the following offices and positions in the State Department of Education shall be included in the unclassified service of the state:

Deputy State Superintendent of Public Instruction; Administrative Assistant; Assistant State Superintendent of Public Instruction and Director—Federal Financial Assistance Programs Division; Assistant State Superintendent of Public Instruction and Director—School Finance Division; Assistant State Superintendent of Public Instruction of the Instructional Division; Administrator of Communications; Informational Representative III; Director of Instructional Programs; Director of Elementary Education Programs; Director of Secondary Education Programs; Assistant Director—School Finance Division; School Lunch Program Administrator; Indian Education Administrator; Administrator, State Aid Section; Administrator—State Textbook Section; Administrator—School Transportation Section; Administrator of Curriculum Section; Guidance and Counseling Section Administrator; Administrator of Educational Television and Instructional Media Section;

**[APPENDIX]**

Administrator of Safety, Driver Education, Health and Physical Education Section; Administrator of Special Education Section; Administrator of Teacher Education and Certification Section; Administrator—Critical Subjects and Special Projects Section; Adult Basic Education Administrator; Administrator, Deprived and Disadvantaged Youth Section, Educational Planning Administrator; Administrator—Evaluation Section; Administrator—Human Relations Section; Administrator of Library Resources Section, State-Federal Programs Division; Administrator, Auditing Section, State-Federal Programs; Educational Research Administrator; Administrator—Supplementary Centers and Services Section; Data Processing Systems Analyst III; Data Processing Coordinator; Chief Examiner; Director of Federal Financial Assistance Programs; and Administrator of Narcotics and Drug Education.

The position of Supervisor, Director or Educational Coordinator in any other State Agency having a primary responsibility to coordinate educational programs operated for children in State Institutions may, at the option of the employing agency, be placed in the Unclassified Service.

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74 O.S. 1971, § 818. Discrimination and other prohibited acts.—No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any

person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

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No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply.

## APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED

APR. 21, 1972

REX B. HAWKS

Clerk, U. S. District Court

By JOANNE JOHANNING

Deputy

WILLIAM M. BROADRICK, ET AL., )  
vs. Plaintiffs, )  
THE STATE OF OKLAHOMA, )  
EX REL., THE OKLAHOMA STATE )  
PERSONNEL BOARD, ET AL., )  
Defendants. )  
No. CIV-71-696

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Final Order entered by the Three Judge Court in this action on March 31, 1972, denying Plaintiffs' Motion for a New Trial on the Order entered in this action on February 28, 1972, denying the declaratory and injunctive relief prayed for in the Complaint pursuant to 42 U.S.C., §1983.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2284, and 42 U.S.C. §1984.

s/ John C. Buckingham

t/ John C. Buckingham

100 Park Avenue Building  
Suite 1213

Oklahoma City, Oklahoma 73102

## CERTIFICATE OF MAILING

I do hereby certify that on the 21st day of April, 1972, I mailed a full, true and exact copy of the within and foregoing Notice of Appeal to the Supreme Court of the United States in Civil 71-696, U. S. District Court for the Western District of Oklahoma, in the United States Mail with postage prepaid and addressed to the following:

Oklahoma State Personnel Board  
407 Sequoyah Building  
State Capitol  
Oklahoma City, Oklahoma 73105

Keith B. Frosco  
407 Sequoyah Building  
State Capitol  
Oklahoma City, Oklahoma 73105

Mr. Larry Derryberry  
The Attorney General of Oklahoma  
State Capitol  
Oklahoma City, Oklahoma 73105

s/ John C. Buckingham  
t/ John C. Buckingham